

Tuesday
April 3, 1979

Part VIII

**Office of Personnel
Management**

Post Employment Conflict of Interest

Approved For Release 2003/11/06 : CIA-RDP85-00988R000400140012-1

**OFFICE OF PERSONNEL
MANAGEMENT****5 CFR Part 737****Post Employment Conflict of Interest**

AGENCY: Office of Personnel Management.

ACTION: Interim regulations made immediately effective, with comments invited for consideration in final rulemaking.

SUMMARY: These regulations particularize the restrictions on post employment activity established by title V of the Ethics in Government Act of 1978 (18 U.S.C. 207); provide guidance to the executive agencies in exercising the administrative enforcement authority reflected in 18 U.S.C. 207(j); and establish the procedures for making certain determinations and designations under the Act.

DATES: Effective date: Subpart A is effective, April 3, 1979. The substantive restrictions, Subpart B, will become effective on July 1, 1979, except that the procedures requiring agency action in §§ 737.13 and 737.25 and the provisions of § 737.29 are effective April 3, 1979.

Comments date: Written comments will be considered if received no later than May 18, 1979.

ADDRESS: Send written comments to: Office of Government Ethics, Room 5315, 1900 E Street, NW, Washington, D.C. 20415.

FOR FURTHER INFORMATION CONTACT: H. Lawrence Garrett (202) 632-7642.

SUPPLEMENTARY INFORMATION:**Background**

On October 26, 1978, Congress enacted the Ethics in Government Act of 1978 ("the Act"). Title IV of the Act created a separate statutory Office of Government Ethics (OGE) within the Office of Personnel Management (OPM). It provided that the new office be headed by the Director of OGE ("the Director") whose responsibilities include developing and recommending to OPM or the President, in consultation with the Attorney General, regulations pertaining to conflicts of interest and ethics in the executive branch. OPM is promulgating these regulations upon the recommendation of the Director in accordance with Title IV of the Act.

Title V of the Act amends 18 U.S.C. 207, which relates to post employment conflicts of interest. These regulations particularize the restrictions on post employment activity established by 18

U.S.C. 207, as amended, to guide employees and give direction as to administrative enforcement. The Attorney General has concurred in the regulations as representing his interpretation of the Act.

These are interim, not proposed, regulations. Most are interpretive or procedural, exempt from 5 U.S.C. 553. Moreover, because of the July 1, 1979 effective date of Title V of the Act, the need in fairness to advise employees as to their responsibilities, and the comment procedures already employed, the Director of OPM, Alan K. Campbell, acting pursuant to 5 U.S.C. 553(b)(B), has found good cause for dispensing with notice of proposed rulemaking and for setting a 45 day comment period. All interested persons are invited to submit comments. After OGE evaluates the comments received, OPM will promulgate final regulations. However, as discussed below, a fair notice rule will result in a five month delay in the effective date for any change in the substance of the final regulations that is more restrictive than the current provisions.

Before preparing these interim regulations, OGE sent a memorandum dated January 16, 1979, to all heads of departments, independent agencies, and Government corporations requesting their comments on the practical problems which might arise under possible applications of the Act. OGE also solicited the comments of several public interest groups. It received more than 40 letters and memoranda in response, and has held numerous discussions with representatives of executive departments, public interest groups, the staffs of legislative committees concerned with the Act and groups of government personnel.

A common theme ran through these responses. There is agreement that regulations should prevent a former Government official from abusing or taking unfair advantage of his prior Government position, but should not incorporate unnecessary restrictions which hinder the Government's ability to attract and retain individuals and to execute its programs. We have attempted to strike a fair balance between these two concerns within the scope of the Act, which is expressed in a statement of policy in the forepart of the regulations.

These regulations are unusual in that they reflect the joint views of OGE and the Department of Justice. The actual narrative language dealing with individual conduct is short, but many examples have been included in both the main text and in set-off paragraphs

in order to insure that the reader will understand the scope of the prohibitions. These examples will also serve to ease the task of agency ethics counsellors in giving advice to current and former employees. Because of the inclusion within the regulations of both examples and statements of rationale, there is no need for an extended preamble. Thus, only certain summary and supplemental information is provided.

Major Provisions

The following briefly summarizes selected provisions of the regulations and points out some of the factors considered in formulating them.

A. Purpose and Policy (§ 737.1)

The amendments to section 207 of 18 U.S.C. not only broadened its substantive prohibitions, but also provided an alternate method of enforcement. Previously the statute was entirely a criminal provision, but Congress amended it to provide for administrative enforcement. (See S. Rep. No. 95-170, 95th Cong., 1st Sess. 34 (1977)). Each agency is responsible not merely for dealing with violations, but perhaps more importantly, for providing prompt advice to former Government employees so as to avoid violations. The attorney general has exclusive authority for criminal enforcement.

B. The subsection (a) Prohibition (§ 737.5)

The prior version of subsection (a) of 18 U.S.C. 207 imposed a permanent prohibition on certain representational activity by a former Government employee in connection with a "particular matter involving a specific party" in which the former employee had participated personally and substantially. The amended version defines the proscribed representational activity with more particularity. The original version prohibited a former Government employee from knowingly acting "as agent or attorney" in a matter; the present version expressly extends to "informal" appearances and provides sanctions for a former employee who "otherwise represents" or "with the intent to influence, makes any oral or written communication" on behalf of another to the Government.

Under both subsections (a) and (b) a former employee is limited only with respect to a "particular matter involving a specific party or parties" in which the United States is "a party or has a direct and substantial interest"—and in which the employee had the prior involvement specified by the statute. This is an important qualification, and means, for

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example, that an employee can participate in formulating a general program or regulation, but not be restricted later as to specific cases involving the application of that program or regulation.

Finally, subsection (a) applies only to matters in which a former government employee has "participated personally and substantially." Thus, violation of this subsection requires more than official responsibility, mere knowledge, or involvement in an administrative or peripheral issue.

C. The subsection (b)(i) Prohibition (§ 737.7)

Subsection (b) of 18 U.S.C. 207 contains two prohibitions. The first, contained in clause (i) of subsection (b), is addressed in § 737.7 of the regulations. For a two year period after the termination of Government employment, it prohibits a former Government employee from representing another before the United States in connection with a particular matter involving a specific party which "was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility." "Official responsibility" is defined in 18 U.S.C. 202. Those matters assigned to an employee by statute, regulation, executive order, job description, or delegation of authority are ordinarily part of his official responsibility.

The 1978 amendments expanded the restriction period from one to two years. Moreover, while the original version of subsection (b) restricted only a former employee who "appears personally . . . as agent, or attorney," the same language regarding the varieties of representational activity which is used in subsection (a), also appears in subsection (b)(i). The new prohibition revises the nature of prior involvement required in that it refers to matters "actually pending under his official responsibility," rather than to matters "under his official responsibility" as set forth in the older version.

D. The subsection (b)(ii) Prohibition (§ 737.9)

Clause (ii) of subsection (b) of 18 U.S.C. 207 is a new provision which prohibits a former Senior Government Employee, for two years after terminating government employment, from assisting in representing another in connection with an appearance before the United States. However, it relates to a narrower range of representation than subsections (a) and (b)(i). That is, it applies only to assistance in representing "concerning any formal or informal appearance", but not an oral or

written communication made with the intent to influence. Thus, for purposes of subsection (b)(ii), the distinction between an "appearance" and a "communication" is important. The two terms are explained in § 737.5.

It is also important to note that subsection (b)(ii) applies solely to representational assistance, not to other kinds of assistance to another person on a particular matter. Senate Bill 555, passed by the Senate on June 27, 1977, had provided that Senior Employees could not "aid, assist or represent" any other person in connection with a matter in which the employee had been involved; but such language was rejected in favor of that in the House bill, which targeted one who "assists in representing" concerning an appearance involving such a matter. Thus, for example, a former employee can actually work on a contract which he awarded, but cannot represent the contractor to the Government. Similarly, a former Senior Employee can assume managerial responsibility for a project under such a contract, even where his decisions as to the work to be done under the contract, and the terms thereof, are communicated to the Government.

A major question encountered in drafting these regulations was whether subsection (b)(ii) should be viewed as applying only to matters that a former Senior Employee had participated in personally and substantially as the legislative history suggests, or whether it applies also to matters actually pending under his official responsibility, as the statutory language suggests.

On February 16, 1979, the Director received a letter and memorandum from the chairmen and ranking members of the House-Senate Conference on the legislation, which have since been published in the Congressional Record of February 21, 1979, at S1613. The memorandum refers to the foregoing language of the Conference Report as well as the stenographic transcript of the House-Senate Conference on S. 555 of October 5, 1978, and concludes that "the two parts of § 207(b) apply to different matters. Section 207(b)(i) applies only to matters under official responsibility and section 207(b)(ii) applies only to matters where there had been personal and substantial involvement." Memorandum at 3.

The literal language of the Act, however, is constraining. Accordingly, the regulations permit applicability of section 207(b)(ii) to the broader set of matters under official responsibility. However, both OGE and the Attorney General have recommended the

adoption of a technical amendment to conform the language of the statute to the intent indicated in the letter of the senior conference managers noted above. Pending action on such a technical amendment, OGE will not designate any Senior Employee for coverage under section 207(b)(ii); however, individuals at the Executive Level and the O-7 level in the uniformed services are covered by the statute without designation by the Director (see section G below).

E. The Subsection (c) Prohibition (§ 737.11)

Subsection (c) is a new provision which restricts a Senior Employee from acting as attorney or agent before, or making contact with an intent to influence, his former agency during a one year "cooling-off" period after termination of government employment. It does not prohibit contacts with respect to matters that (a) involve no element of potential controversy, (b) are neither pending before, nor of direct or substantial interest to, the agency, or (c) are of a personal and individual nature, such as personal income taxes, pension benefits, or the application of these restrictions. It also does not prohibit statements based on the former Senior Employee's own special knowledge, including political expression.

F. Exemption for Scientific and Technological Information (§ 737.15)

The post employment restrictions of 18 U.S.C. 207 do not apply to communications made solely for the purpose of furnishing scientific or technological information under procedures acceptable to the agency concerned. The regulations do not enlarge, but give realistic effect to, the exemption by making clear that communications to determine technical problems confronting the Government for the purpose of proposing an approach or solution are within the exemption, and that scientific and technological information may incorporate such data and information as is necessary to understand its practical significance. Each agency is responsible for developing procedures to permit the interchange of such information in a manner consistent with the purposes of the Act. The regulations do not prescribe procedures, but based upon comments received, set forth a number of factors which might be considered. Agency procedures will be reviewed periodically to determine whether this area is being managed properly.

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*G. Designation of Senior Employees Positions
(\$ 737.25)*

The prohibitions of subsections (a) and (b)(i) of 18 U.S.C. 207 apply to all former Government employees. However, the additional prohibitions of subsections (b)(ii) and (c) of 18 U.S.C. 207 apply only to former Senior Government employees. These "Senior Employees" are the four categories specified in subsection (d) of 18 U.S.C. 207. Two of these categories are made subject to the additional restrictions by the statute alone. These are "Executive Level" employees, identified by subsection (d)(1), and persons on active duty as commissioned officers of a uniformed service assigned to pay grade of O-7 or above, identified by subsection (d)(3). The restrictions of subsection (b)(ii) and (c) will apply to these individuals on July 1, 1979.

Two other categories of employees are not covered automatically by statute, but rather require the Director to designate specific positions. Subsection (d)(2) lays the basis for application to a person in a position for which the basic rate of pay is equal to or greater than that for a GS-17 and "who has significant decision-making or supervisory responsibility." Subsection (d)(4) covers other persons who have significant decision-making authority or other duties which are substantially similar to those exercised by persons covered by subsection (d)(2).

The regulations establish a procedure for designations by the Director under the latter two subsections. Certain positions will be designated effective October 1, 1979, unless exempted, and the restrictions will apply to the incumbents on or after that date. These are all positions classified at, or the rate of pay of which is at least that of, GS-17 as well as all positions in the Senior Executive Service. Exemptions from designation will be made by the Director prior to October 1, 1979, on the recommendations of each agency, based on the criteria specified in the regulations. The regulations do not establish a substantive presumption that all such positions should be included, although the pay level of the positions involved, as well as the criteria in the Civil Service Reform Act regarding positions made part of the Senior Executive Service, at least suggest that such inclusion would be appropriate. Rather, the regulations prescribe an operating technique to require each agency, which is in the best position to articulate facts supporting nondesignation, to do so.

All other positions which might properly be designated are to be proposed for coverage by each agency's designated agency ethics official, who has special responsibility for administration of the Act and is appropriately situated to oversee and endorse the work necessary to effect these supplemental designations. Designations by the Director will become effective five months after the publication of an official notice of an intention to designate.

The exact dates, standards and procedures for the foregoing designations are set forth in the regulations.

H. Effective Dates (\$ 737.29)

Employees whose effective date of retirement or resignation is on or before July 1, 1979, are not subject to the restrictions added by the 1978 amendments.

The regulations provide for fair notice of any substantive change in these regulations with respect to a Government employee who is adversely affected by the change. As to incumbents, such a change will not become effective until five months after the publication of the final regulations effecting the change. This will give an employee who has relied upon the regulations and finds the change unacceptable an opportunity to seek other employment. An employee who accepts an affected position after the change has been published in final form immediately becomes subject to it.

I. Other possible amendments

Both OGE and the Attorney General have recommended two additional clarifying amendments. The first would limit the prohibition of section 207(b)(ii) of Title 18 U.S.C. to assistance in representing through personal presence at an appearance before the Government. The second would amend § 207(d) of Title 13 U.S.C. so that commissioned officers of a uniformed service at pay grade of O-7 and O-8 are treated equally with civilians of comparable rank, in that they would be subject to the provisions for Senior Employees only if designated by the Director.

OPM is adding Part 737 to Title 5 of the Code of Federal Regulations, as set forth below:

PART 737—REGULATIONS CONCERNING POST EMPLOYMENT CONFLICT OF INTEREST**Subpart A—General Provisions**

Sec.

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- (a) Statutory definitions.
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737.5

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- (1) Attorneys and agents.
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- (3) Appearances; communications made with intent to influence.

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737.7

(a) 18 U.S.C. 207(b)(i).**(b) Official responsibility.****(1) Definition.****(2) Determining official responsibility.****(3) Ancillary matters and official responsibility.****(4) Knowledge of matter pending required.****(5) Self-disqualification.****(c) "Actually pending".****(d) Other essential requirements.****(e) Measurement of two-year restriction period.**

737.9

(a) 18 U.S.C. 207(b)(ii).**(b) Representational assistance.****(c) Managemental assistance.****(d) Representational assistance.****(e) Degree of prior participation or responsibility required.****(f) Personal and substantial participation required.****(g) Measurement of restriction period.****(h) Other essential requirements.****(i) General examples.**

737.11

(a) 18 U.S.C. 207(c).**(b) No prior involvement required.****(c) Specific parties unnecessary.****(d) Element of controversy or influence required.**

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- (j) Agency activity or interest in matter.
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37.21 Partners of Present or former Government Employees.

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Appendix A [Reserved]

Appendix B [Reserved]

Appendix C [Reserved]

Authority: Pub. L. 95-521, 92 Stat. 1862-1863 (5 U.S.C. Appendix), 92 Stat. 1864-1867 (18 U.S.C. 207).

Subpart A—General Provisions**§ 737.1 Purpose and Policy.**

(a) **Authority.** Title IV of the Ethics in Government Act of 1978 ("the Act") established the Office of Government Ethics within the Office of Personnel Management ("OPM"). Section 402(a) of the Act provides in part that the Director, Office of Government Ethics ("the Director") shall provide, under the general supervision of OPM, overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency as defined in section 105 of title 5, United States Code, and shall propose, in consultation with the Attorney General, rules and regulations to be promulgated by the President or by OPM. The purpose of this part is to issue regulations recommended by the Director which give content to the restrictions on post employment activity established by title V of the Act (18 U.S.C. 207) for administrative enforcement with respect to former officers and employees of the executive branch; generally to guide agencies in exercising the administrative enforcement authority reflected in section 18 U.S.C. 207(j); and to set forth the procedures to be employed in making certain determinations and designations pursuant to the Act. Criminal enforcement of the provisions of 18 U.S.C. 207 remains the exclusive responsibility of the Attorney General.

(b) **Consultation with the Attorney General.** In proposing these regulations, the Director consulted with the Attorney General as to the content of regulations governing substantive prohibitions as well as other matters. The Attorney General has advised that such regulations are consistent with his opinion as to the interpretation of the Act.

(c) **Policy and limitations.** These regulations bar certain acts by former Government employees which may reasonably give the appearance of making unfair use of prior Government employment and affiliations.

(1) When a former Government employee who has been involved with a particular matter decides to act as the representative for another person on that matter, such "switching of sides" undermines confidence in the fairness of

proceedings and creates the impression that personal influence, gained by Government affiliation, is decisive.

(2) Similarly, when a former high-level employee assists in representing another in connection with such a matter which is in dispute in a proceeding involving the Government, such assistance suggests the unfair use of information unavailable to others. Different considerations are involved, however, with respect to assistance given as part of customary supervisory participation in a project funded by a Government contract or grant, since a former employee's knowledge may benefit the project and thus the Government; and regular communications with associates may properly be regarded as inherent in managerial responsibility and difficult to distinguish as restricted conduct.

(3) When a former Senior Employee returns to argue a matter to the employee's former agency in the period immediately following the termination of official employment, it appears that Government-based relationships are being used for private ends.

(4) Former officers and employees may fairly be required to avoid such activities in the circumstances specified by statute and in these regulations.

(5) The provisions of 18 U.S.C. 207 do not, however, bar any former Government employee, regardless of rank, from employment with any private or public employer after Government service. Nor do they effectively bar employment even on a particular matter in which the former Government employee had major official involvement (except in certain circumstances involving persons engaged in professional advocacy). Former Government employees may be fully active in high-level supervisory positions whether or not the work is funded by the United States and includes matters in which the employee was involved while employed by the Government. The statutory provisions are not intended to discourage the movement of skilled professionals in Government, to and from positions in industry, research institutions, law and accounting firms, universities and other major sources of expertise. Such a flow of skills can promote efficiency and communication between the Government and private activities, and it is essential to the success of many Government programs. Instead, only certain acts which are detrimental to public confidence in the Government are prohibited.

(6) It is essential that title V of the Act be effectively enforced. Agencies should act on the premise that they have

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primary responsibility for the enforcement of the post-employment restrictions, and that criminal enforcement may be undertaken in cases involving aggravated circumstances. Enforcement should avoid unnecessarily severe applications which do not serve the purpose of the Act but adversely effect the Government's ability to attract and retain employees, and consequently, the success of its programs. Special attention should be given to the need to preserve the free flow of expertise, especially in scientific, technological and other technical areas from private activities to the Government.

(7) The examples contained in these regulations are intended to give guidance, but are illustrative, not comprehensive. Each agency may provide additional illustration and guidance in its own regulations, consistent with that contained herein, in order to address specific problems arising in the context of a particular agency's operations.

(8) Agencies have the responsibility to provide assistance promptly to former Government employees who seek advice on specific problems. The Office of Government Ethics will provide advice, promptly, upon request, to designated agency ethics officials in such situations, but will first coordinate with the Department of Justice on unresolved or difficult issues.

(9) These regulations do not incorporate restrictions contained in the code of conduct of a profession of which an employee may be a member.

§ 737.3 Definitions.

(a) *Statutory definitions.* The following are defined terms which largely repeat portions of the text of the statute. They are set out here to permit a simplified presentation of statutory requirements in the regulations which follow. Other definitions, which supplement the statutory language, are listed in paragraph (b) below and are set forth in detail in the substantive regulations.

(1) "United States" or "Government" means any department, agency, court, court-martial, or any civil, military or naval commission of the United States, the District of Columbia, or any officer or employee thereof.

(2) "Agency" includes an Executive Department, a Government corporation and an independent establishment of the executive branch (which includes an independent commission). See 18 U.S.C. 6.

(3) "Government Employee" includes any officer or employee of the Executive

Branch (as defined in 18 U.S.C. 202 and, e.g., 5 U.S.C. 2104 and 2105) including a Special Government Employee.

(4) "Former Government Employee" means one who was, and is no longer, a Government employee.

(5) "Special Government Employee" means an officer or employee of an agency who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty five consecutive days, temporary duties either on a full time or intermittent basis (18 U.S.C. 202).

(6) "Senior Employee" means an officer or employee named in, or designated by the Director pursuant to section 207(d) of title 18 U.S.C. (See 737.25 below).

(7) "Particular Government matter involving a specific party" means any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest.

(b) *Interpretative definitions.* Other terms defined and interpreted in the substantive regulations are:

(1) "Acting as Agent or Attorney": (See 737.5(b)).

(2) "Actually Pending": (See 737.7(c)).

(3) "Communicating with Intent to Influence": (See 737.5(b)).

(4) "Direct and Substantial Interest": (See 737.11(e)).

(5) "Participate Personally and Substantially": (See 737.5(d)).

(6) "Particular Matter Involving a Specific Party or Parties": (See 737.5(c)).

(7) "Particular Matter" (without parties): (See 737.11(c)).

(8) "Official Responsibility": (See 737.7(b)).

(9) "Rate of Pay": (See 737.25(b)(5)).

Subpart B—Substantive Provisions

§ 737.5 Restrictions on any Former Government Employee's Acting as Representative as To a Particular Matter in Which the Employee Personally and Substantially Participated.

(a) *Basic Prohibition of 18 U.S.C. 207(a).* No former Government employee, after terminating Government employment, shall knowingly act as agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of any other person to, (1) the United

States, (2) in connection with any particular Government matter involving a specific party, (3) in which matter such employee participated personally and substantially as a Government employee.

(b) *Representation: Acting as agent or attorney, or other representative in an appearance, or communicating with intent to influence.* (1) *Attorneys and agents.* The target of this provision is the former employee who participates in a particular matter while employed by the Government and later "switches sides" by representing another person on the same matter. [NOTE: The examples in these regulations do not incorporate the special statutory restrictions on Senior Employees, except where the terms "Senior Employee" or "Senior" are expressly used.]

Example 1: A lawyer in the Department of Justice personally works on an antitrust case involving Q company. After leaving the Department, he is asked by Q company to represent it in that case. He may not do so.

(2) *Others.* The statutory prohibition covers any other former employee, including managerial and technical personnel, who represents another person in an appearance or, by other communication, attempts to influence the Government concerning a particular matter in which he was involved. For example, a former technical employee may not act as a manufacturer's promotional or contract representative to the Government on a particular matter in which he participated. Nor could such employee appear as an expert witness against the Government in connection with such a matter. (See 737.19 for specific rules relating to expert witnesses.)

(3) *Appearances; communications made with intent to influence.* An appearance occurs when an individual is physically present before the United States in either a formal or informal setting or conveys material to the United States in connection with a formal proceeding or application. A communication is broader than an appearance and includes correspondence, a telephone call, or other means. However, neither a prohibited appearance nor communication occurs when a former Government employee communicates with a Government employee who, at the instance of the United States, visits or is assigned to premises leased to, or owned or occupied by, a person other than the United States which are or may be used for performance under an actual or proposed contract or grant, unless such communication concerns work

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performed or to be performed and occurs in the ordinary course of evaluation, administration, or performance of the actual or proposed contract or grant.

Example 1: An appearance occurs when a former employee meets with an agency employee personally to discuss a matter, or when he submits a brief in an agency administrative proceeding in his own name.

Example 2: A former employee makes a telephone call to a present employee to discuss a particular matter that is not the subject of a formal proceeding. She has made a communication.

(4) Elements of "influence" and potential controversy required.

Communications which do not include an "intent to influence" are not prohibited. Moreover, acting as agent or attorney in connection with a routine request not involving a potential controversy is not prohibited. For example, the following are not prohibited: a question by an attorney as to the status of a particular matter; a request for publicly available documents; or a communication by a former employee, not in connection with an adversary proceeding, imparting purely factual information. (See also 737.11(d) below.)

Example 1: A government employee, who participated in writing the specifications of a contract awarded to Q Company for the design of certain education testing programs, joins Q Company and does work under the contract. She is asked to accompany a company vice-president to a meeting to state the results of a series of trial tests, and does so. No violation occurs when she provides the information to her former agency. During the meeting a dispute arises as to some terms of the contract, and she is called upon to support Q Company's position. She may not do so. If she had reason to believe that the contractual dispute would be a subject of the meeting, she should not have attended.

(5) Assistance. A former employee is not prohibited from providing in-house assistance in connection with the representation of another person unless he or she was a Senior Employee when participating in the particular matter. (See 737.9 below.)

Example 1: A Government employee administered a particular contract for agricultural research with Q Company. Upon termination of her Government employment, she is hired by Q Company. She works on the matter covered by the contract, but has no direct contact with the Government. At the request of a company vice-president, she prepares a paper describing the persons at her former agency who should be contacted and what should be said to them in an effort to increase the scope of funding of the contract and to resolve favorably a dispute over a contract clause. She may do so.

(6) Project responses not included. In a context not involving a potential controversy involving the United States no finding of an "intent to influence" shall be based upon whatever influential effect inheres in an attempt to formulate a meritorious proposal or program.

Example 1: The employee of Q Company in the previous example is asked to design an educational testing program, which she does and transmits it to the Government. This is not prohibited despite the fact that her well-designed program may be inherently influential on a question of additional funding under the contract. She may not argue for its acceptance.

(c) "Particular matter involving a specific party or parties". **(1) Specific matters vs. policy matters.** The prohibitions of subsections (a) and (b) of 18 U.S.C. 207, are based on the former Government employee's prior participation in or responsibility for a "judicial or other proceeding, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, claim, arrest, or other particular matter involving a specific party or parties" in which the United States is a party or has a direct and substantial interest. Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter. Therefore, a former Government employee may represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding.

Example 1: A Government employee formulated the policy objectives of an energy conservation program. He is not restricted from later representing a university which seeks a grant or contract for work emerging from such a program.

Example 2: A Government employee reviews and approves a specific city's application for Federal assistance for a renewal project. After leaving Government service, he or she may not represent the city in relation to that project.

Example 3: An employee is regularly involved in the formulation of policy, procedures and regulations governing departmental procurement and acquisition functions. Participation in such activities does not restrict the employee as to particular cases involving the application of such policies, procedures, or regulations.

Example 4: An employee of the Office of Management and Budget participates substantially in the merits of a decision to reduce the funding level of a program, which

has the effect of reducing the amount of money which certain cities receive to conduct youth work programs. After leaving the Government she may represent any of the cities in securing funds for its youth program, since her participation was in connection with a program, not a particular matter involving specific parties.

(2) Technical matters. In connection with technical work, participation in projects generally involving one or more scientific or engineering concepts, in feasibility studies, or in proposed programs prior to the formulation of a contract will not restrict former Government employees with respect to a contract or specific programs entered into at a later date.

Example 1: A Government employee participates significantly in formulating the "mission need" of a project pursuant to OMB Circular No. A-109, and the award of a contract to Z Company, the purpose of which is to propose alternative technical approaches. He is not barred, after leaving Government service, from representing Q Company which later seeks a contract to manufacture one of the systems suggested by the Z Company.

Example 2: A Government employee, who has worked for years on the design of a new satellite communications system, joins C Company. Later, the Government issues a "request for proposals" ("rfp") to construct the new system, which is circulated generally to industry. The employee proposes to act as C Company's representative in connection with its anticipated proposals for the contract. He may do so. The satellite contract became a particular matter when the rfp was being formulated; it would ordinarily not become one involving a specific party or parties until initial proposals by contractors were first received. Moreover, if the employee's work for C Company were limited to the formulation and communication of a proposal in response to the rfp, it would not be prohibited to the extent it involved a communications for the purpose of furnishing scientific or technological information to the Government, exempt under 18 U.S.C. 207(f). See 737.15 below. (See paragraph (3) below as to a case where the employee's own participation may cause a different result).

(3) Relationship of personal participation to specificity. In certain cases, whether a matter should be treated as a "particular matter" involving specific parties may depend on the employee's own participation in events which give particularity and specificity to the matter in question. For example, if a Government employee personally participated in that stage of the formulation of a proposed contract where significant requirements were discussed and one or more persons was identified to perform services thereunder, but the contract was actually awarded only after the employee left, it may nevertheless

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particular matter as to such former Government employee.

Example 1: A Government employee advises her agency that it needs certain work done and meets with private firm X to discuss and develop requirements and operating procedures. Thereafter, the employee meets with agency officials and persuades them of the need for a project along the lines discussed with X. She leaves the Government and the project is awarded by other employees to firm X. The employee is asked by X to represent it on the contract. She may not do so.

(4) *The same particular matter must be involved.* The requirement of a "particular matter involving a specific party" applies both at the time that the Government employee acts in an official capacity and at the time in question after Government service. The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

Example 1: A government employee was substantially involved in the award of a long-term contract to Z Company for the development of alternative energy sources. Six years after he terminates Government employment, the contract is still in effect, but much of the technology has changed as have many of the personnel. The Government proposes to award a "follow on" contract, involving the same objective, after competitive bidding. The employee may represent Q Company in its proposals for the follow-on contract, since Q Company's proposed contract is a different matter from the contract with Z Company. He may also represent Z Company in its efforts to continue as contractor, if the agency determines on the basis of facts referred to above, that the new contract is significantly different in its particulars from the old. The former employee should first consult his agency.

Example 2: A Government employee reviewed and approved certain wiretap applications. The prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter as the initial wiretap application. The validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved.

Other examples: See 737.5(b)(1), Example 1, and (c), Example 2.

(5) *United States must be a party or have an interest.* The particular matter must be one in which the United States is a party, such as in a judicial or administrative proceeding or a contract, or in which it has a direct and

substantial interest. The importance of the Federal interest in a matter can play a role in determining whether two matters are the same particular matter.

Example 1: An attorney participated in preparing the Government's antitrust action against Z Company. After leaving the Government, she may not represent Z Company in a private antitrust action brought against it by X Company on the same facts involved in the Government action. The interest of the United States preventing inconsistent results and the appearance of impropriety in the same factual matter involving the same party, Z Company, is direct and substantial. However, if the Government's antitrust investigation or case is closed, the United States no longer has a direct and substantial interest in the case.

Example 2: A member of a Government team providing technical assistance to a foreign country leaves and seeks to represent a private contractor in securing a contract to perform the same service. The proposed new contract may or may not be considered a separate matter, depending upon whether the United States has a national interest in maintaining the original contract. The agency involved must be consulted by the former employee before the representation can be undertaken.

(d) *"Participate personally and substantially."* (1) *Basic requirements.* The restrictions of section 207(a) apply only to those matters in which a former Government employee had "personal and substantial participation", exercised "through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise." To participate "personally" means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. "Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. It is essential that the participation be related to a "particular matter involving a specific party." (See paragraph (c) above.)

Example 1: If an officer personally approves the departmental budget, he does not participate substantially in the approval of all items contained in the budget. His participation is substantial only in those cases where a budget item is actually put in

issue. Even then, the former Government employee is not disqualified with respect to an item if it is a general program rather than a particular matter involving a specific party. The former Government employee may, however, have official responsibility for such matters. (See 737.7(b))

Example 2: A Government lawyer is not in charge of, nor has official responsibility for a particular case, but is frequently consulted as to filings, discovery, and strategy. Such an individual has personally and substantially participated in the matter.

(2) *Participation on ancillary matters.* An employee's participation on subjects not directly involving the substantive merits of a matter may not be "substantial", even if it is time-consuming. An employee whose responsibility is the review of a matter solely for compliance with administrative control or budgetary considerations and who reviews a particular matter for such a purpose should not be regarded as having participated substantially in the matter, except when such considerations also are the subject of the employee's proposed representation. (See 737.7(b)(3) below.) Such an employee could theoretically cause a halt in a program for noncompliance with standards under his or her jurisdiction, but lacks authority to initiate a program or to disapprove it on the basis of its substance.

(3) *Role of official responsibility in determining substantial participation.* Although "personal and substantial participation" is different from "official responsibility," the latter may play a role in determining the "substantiality" of the employee's participation. For example, mere forbearance is not ordinarily substantial participation. But, if an agency's procedures require that an officer review certain matters and action cannot be taken if the officer objects, then if the officer actually receives proposal documents on the particular matters, his participation may be regarded as "substantial", even if he claims merely to have engaged in inaction.

(e) *Agency responsibility in complex cases.* In certain complex factual cases, the agency with which the former Government employee was associated is likely to be in the best position to make a determination as to certain issues, for example, the identity or existence of a particular matter. Designated agency ethics officials should provide advice promptly to former Government employees who make inquiry on any matter arising under these regulations.

§ 737.7 Two-Year Restriction on any Former Government Employee's Acting as Representitive as to a Particular Matter For Which The Employee Had Official responsibility.

(a) *Basic Prohibition of 18 U.S.C. 207(b)(i).* No former Government employee, within two years after terminating employment by the United States, shall knowingly act as agent or attorney for, or otherwise represent any other person in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of any person to (1) the United States, (2) in connection with any particular Government matter involving a specific party (3) if such matter was actually pending under the employee's responsibility as an officer or employee within a period of one year prior to the termination of such responsibility.

(b) "Official responsibility."

(1) *Definition.* "Official responsibility" is defined in 18 U.S.C. 202 as, "the direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government actions."

(2) *Determining official responsibility.* Ordinarily, the scope of an employee's "official responsibility" is determined by those areas assigned by statute, regulation, Executive Order, job description or delegation of authority. Any particular matter under consideration in an agency is under the "official responsibility" of the agency head, as well as that of each intermediate supervisor having responsibility for an employee who actually participates in the matter within the scope of his duties.

(3) *Ancillary matters and official responsibility.* "Administrative" authority as used in the foregoing definition means authority for planning, organizing and controlling matters rather than authority to review or make decisions on ancillary aspects of a matter such as the regularity of budgeting procedures, public or community relations aspects, or equal employment opportunity considerations. Responsibility for such an ancillary consideration does not constitute responsibility for the particular matter, except when such a consideration is also the subject of the employee's proposed representation.

Example 1: An agency's comptroller would not have official responsibility for all programs in the agency, even though she can review the budget, and all such programs are contained in the budget.

Example 2: Within two years after terminating employment, an agency's former comptroller is asked to represent Q Company in a dispute arising under a contract which was in effect during the comptroller's tenure. The dispute concerns an accounting formula, under the contract, a matter as to which a subordinate department of the comptroller's office was consulted. She may not represent Q Company on this matter.

(4) *Knowledge of matter pending required.* In order for a former employee to be barred from representing another as to a particular matter, he need not have known, while employed by the Government, that the matter was pending under his official responsibility. However, he is not subject to the restriction unless at the time of the proposed representation of another, he knows or learns that the matter had been under his responsibility. Ordinarily, a former employee who is asked to represent another on a matter will become aware of facts sufficient to suggest the relationship of the prior matter to his former agency, and if so, he is under a duty to make further inquiry, including direct contact with an agency's designated ethics official where the matter is in doubt.

(15) *Self-disqualification.* A former employee cannot avoid the restrictions of this section by disqualifying himself with respect to a matter for which he otherwise has official responsibility, but may avoid personal and substantial participation by doing so.

(c) "Actually pending". "Actually pending" means that the matter was in fact referred to or under consideration by persons within the employee's area of responsibility, not that it merely could have been.

Example 1: A staff lawyer in a department's Office of General Counsel is consulted by procurement officers on the correct resolution of a contractual matter involving Q Company. The lawyer renders an opinion resolving the question. The same legal question arises later in several contracts with other companies, but none of the disputes with such companies are referred to the Office of the General Counsel. The General Counsel has official responsibility for the determination of the Q Company matter. If no other matters were never "actually pending" under that responsibility, although as a theoretical matter, such responsibility extended to all legal matters within the department.

(d) *Other essential requirements.* All other requirements of the statute must be met before the restriction on representation applies. The same considerations apply in determining the existence of a "particular matter involving a specific party", a representation in an "appearance", or

"intent to influence", and so forth as set forth under § 737.5 above.

Example 1: During her tenure as head of an agency, an officer's subordinate undertook major changes in agency enforcement standards involving occupational safety. Eighteen months after terminating Government employment, she is asked to represent Z Company which believes it is being unfairly treated under the enforcement program. The Z Company matter first arose on a complaint filed after the agency head terminated her employment. She may represent Z Company because the matter pending under her official responsibility was not one involving "a specific party." (Moreover, the time-period covered by 18 U.S.C. 207(c) has elapsed.)

(e) *Measurement of two-year restriction period.* The statutory two-year period is measured from the date when the employee's responsibility in a particular area ends, not from the termination of Government service, unless the two occur simultaneously. The prohibition applies to all particular matters subject to such responsibility in the one-year period before termination of such responsibility.

Example 1: An employee transfers from a position in A Agency to a position in B Agency, and she leaves B Agency for private employment 18 months later. She will be free of restriction insofar as matters under her responsibility at A Agency are concerned. She will be restricted for two years in respect of B Agency matters, which were pending in the year before her departure.

§ 737.9 Two-Year Restriction on a Former Senior Employee's Assisting in Representing as to a Matter in Which the Employee Participated Personally and Substantially or For Which the Employee Had Official Responsibility.

(a) *Basic Prohibition of 18 U.S.C. 207(b)(ii).* No former Senior Employee, within two years after terminating Government employment shall knowingly represent or aid, counsel, advise, consult, or assist in representing any other person in any formal or informal appearance before, (1) the United States, (2) in connection with any particular Government matter involving a specific party, (3) if such matter was actually pending under the employee's official responsibility within one year prior to the termination of such employment or was one in which he or she participated personally and substantially.

[Note.—The regulations and examples in this section will be revised if certain technical amendments to the statute are adopted.]

(b) *Limitation to "representational" assistance in an appearance.* Section 207(b)(ii)'s limit to assistance "in representing" another person concerning

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an "appearance" before the United States. Different in scope from sections 207(a) and 207(b)(i), it does not bar assistance in connection with an oral or written communication made with an intent to influence. Instead the prohibition relates solely to assistance in preparation for, or performance of, either a formal or informal personal appearance or a written submission in a formal proceeding.

(c) *Managerial Assistance.* The statute does not prohibit a former Senior Employee's assistance to representatives which can reasonably be viewed as customary managerial activity; that is, assistance given by a former Senior Employee to associates or subordinates, in the performance of customary executive, administrative or supervisory duties, as to the content of a program or project under his responsibility, for or funded by the Government, is lawful. Such duties customarily require a manager to make or approve decisions and suggestions as to how, and on what terms, any of the physical or human resources of his organization will be utilized in its performance under any current or proposed Government contract or grant, and to communicate such matters to coworkers, including representatives. The content of a program or project, comprised of the results of such decisions, in turn must be, and may properly be, communicated to the Government by an organization through its representatives. While the former employee should not actually draft documents to be submitted in any appearance if the documents contain argumentative material (except that he may furnish scientific and technological information), he has the right to insure that such documents accurately present information and reflect such decisions made by him or others in the organization. Former Senior Employees may not undertake activities which are prohibited as set forth in paragraph (d).

(d) *Representational Assistance.* The statute prohibits a former Senior Employee from making unfair use of his prior governmental position by assisting in the representation of another by (1) giving specific advice directly to or intended for use by a representative as to how the representation in an appearance should be conducted utilizing specific knowledge which came to him as a government employee,¹ or (2) supplying inside information as to the

Government's position on a specific, potentially controversial matter; (3) directly participating in drafting briefs and similar formal documents to be submitted to the Government to obtain a benefit or favorable decision, except that he may give technical and managerial advice and supervision in the preparation of substantive material for, and in the review of, applications and proposals; or (4) preparing forensic or argumentative material (such as testimony, methods of persuasion, or strategy of presentation) to be included in formal documents to be submitted to the Government or to be used in connection with such a submission or an appearance.

(e) *Degree of prior participation or responsibility required.* Section 207(b)(ii) applies to a particular matter in which the employee participated personally and substantially, or which was actually pending under his official responsibility.

[Provisional (e). Will replace (e) above upon technical amendment of the statute.]

(e) *Personal and substantial participation required.* This section applies only in cases where the former Senior Employee had personal and substantial participation in the particular matter involved.]

(f) *Measurement of restriction period.* The statutory two-year period is measured from the date when the individual's responsibility as a Senior Employee in a particular area ends, not from the termination of Government service, unless the two occur simultaneously. The prohibition applies to all particular matters subject to such responsibility in the one-year period before termination and to particular matters in which the individual was personally and substantially involved. (See 737.7(c).)

(g) *Other Essential Requirements.* All conditions of the statutory prohibition must be met. Specifically, (1) the former employee must have been a "Senior Employee"; (2) who was involved (see subpart 737.5(c) above) in (3) a "particular matter involving a specific party." (See subpart 737.5(c) above.) The assistance in representing (4) must be representational aid directly concerning a formal or informal appearance before the United States, and (5) involve something more than the furnishing of mere information (not including forensic argument) which is not based on a prior Governmental relationship and unavailable to others.

(h) *General Examples:*

Example 1: A Senior Justice Department lawyer personally works on an antitrust case against Z Company. After leaving the Department, she is asked to discuss legal strategy with lawyers representing Z Company on that same antitrust case, to write portions of a brief and to direct the research of a staff working on the case. Any such aid would be prohibited.

Example 2: A Senior Federal Trade Commission employee, an economist by profession, participates in an investigation involving X Company, and a proceeding is commenced against X Company based on the investigation. After leaving the Commission, he offers to serve as a consultant to the lawyers for X Company on certain economic matters involved in the proceeding. Such consultation is prohibited.

Example 3: A Senior Employee of the Department of the Treasury participates in a number of projects with universities and financial research institutions funded by Government grants. After leaving the Government, she becomes dean of a graduate school of business which performs work under a number of such grants. She may, in the discharge of her duties, supervise research and advise as to how funds under such a contract should be allocated, whether or not these matters are, as is likely, communicated to her former Department by the graduate school's representatives.

Example 4: A Senior Defense Department official participated personally and substantially in a contract award to F Company for fighter planes. After leaving the Department, the former official goes to work for F Company. Subsequently, F company desires to renegotiate prices and a pension provision on the fighter plane contract, matters in which dispute is anticipated. The former official could not advise the lawyers for the contractor on how to obtain DOD approval of that revision. If the approval were already obtained, he could participate in discussions concerning the changes and how they should be implemented.

Example 5: In the preceding example, a different situation arises. F Company believes that changes should be made in the design of the fighter plane, in allocation of work force, in the work schedule and pricing. The former official supervises the division of F Company which is working on this contract. When the former official discusses and evaluates the content of the proposed changes with the contract representatives who will in turn discuss proposals with the Department, such official is discharging a legitimate managerial duty.

Example 6: A Senior Justice Department lawyer personally works on an antitrust case against Q Company, which is represented by Y law firm. Immediately after leaving the Department, she goes to work with Y law firm, and assists the lawyers representing Q Company in a different antitrust case, not involving the allegations in the Government case. Such assistance would not be barred. The assistance does not occur in connection with the same particular matter.

Example 7: A Senior official of the Department of Health, Education, and Welfare leaves to take a university position.

¹Given the literal language of the statute, the Attorney General believes it cannot be restricted to "specific knowledge which came to him as a government employee". But in the exercise of his prosecutorial discretion, the Attorney General will use the interpretation in this regulation.

²Editorial Note: Upon passage of the technical amendment to the statute, Provisional (e) will be issued as a final regulation in the Federal Register and will replace paragraph (e).

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The former official's new duties include various HEW contracts which the University holds, and she sometimes advises the lawyers who represent the University in disputes involving such contracts. Some of the contracts were awarded by a division within HEW which was under her official responsibility. The restriction applies to those matters for which she had official responsibility.

Example 8: A Senior scientist with the Food and Drug Administration was personally and substantially involved in a licensing proceeding concerning a specific drug. After leaving the FDA, he is employed by the manufacturer of that drug. There he engages in research, indicating that the drug is safe and effective, which his employer later provides to FDA in connection with the proceeding. The restriction does not apply because the former official is furnishing scientific information to the Government. (See 18 U.S.C. 207(l) and 737.15 below)

Example 9: A former Senior Employee of the Federal Communications Commission leaves the agency to join a law school faculty. In one of his courses, he discusses, unfavorably to the Commission, a specific licensing case in which he was personally and substantially involved. The restriction does not apply because the conduct does not occur in connection with any representational activities.

§ 737.11 One-Year Restriction on a Former Senior Employee's Transactions With Former Agency on a Particular Matter, Regardless of Prior Involvement

(a) *Basic prohibition of 18 U.S.C. 207(c).* For a period of one year after terminating Government employment, no former Senior Employee (other than a special Government employee who serves for less than sixty days in a calendar year) shall knowingly act as an agent or attorney for, or otherwise represent, anyone in any formal or informal appearance before, or with the intent to influence, make any written or oral communication on behalf of anyone to (1) his or her former department or agency, or any of its officers or employees, (2) in connection with any particular Government matter, whether or not involving a specific party, which is pending before such department or agency, or in which it has a direct and substantial interest.

(b) *No prior involvement required.* The prohibition contained in this section applies without regard to whether the former Senior Employee had participation in, or responsibility for, the particular matter and includes matters which first arise after the employee leaves Government service. The section aims at the possible use of personal influence based upon past Governmental affiliations to facilitate a transaction of business.

(c) *Specific parties unnecessary.* The particular matter need not be one "involving specific parties", and thus is not limited to disputed proceedings or contracts in which a party has already been identified. However, the restriction does not encompass every kind of matter, but only a particular one similar to those cited in the statutory language, i.e., any judicial or other proceeding, application, request for a ruling or determination, contract, claim, controversy, investigation, charge, accusation, or arrest. Rulemaking is specifically included. Thus such matters as the proposed adoption of a regulation or interpretive ruling, or an agency's determination to undertake a particular project or to open such a project to competitive bidding are covered. Not included are broad technical areas and policy issues and conceptual work done before a program has become particularized into one or more specific projects. The particular matter must be pending before the agency or be one in which the agency has a "direct and substantial interest". (NOTE: Each post-employment activity in the examples in this section is assumed to take place within one year of termination of Government employment).

Example 1: A Senior Employee of the Department of Health, Education and Welfare leaves Government employment for private practice, and shortly thereafter telephones a former associate urging that the Department (a) adopt a new procedure to put a ceiling on hospital costs; (b) not adopt a particular rule proposed for drug testing; and (c) oppose a bill pending in Congress relating to such drug testing. He is prohibited from attempting to influence his former co-worker on any of these matters. The first, not yet pending, is of interest to the Department; the second is pending in the Department; and the third is pending elsewhere, and of interest to the Department. Note that the former Senior Employee may, however, communicate the same views to Congress, other agencies, the public or the press.

Example 2: A recently retired Senior Employee of the Department of Defense believes that the Department's general emphasis on manned aircraft is not in the national interest. After his departure, he may continue to argue the point to the Department.

(d) *Element of controversy or influence required.* The prohibition on acting as a representative or attempting to influence applies to situations in which there is an appreciable element of actual or potential dispute or an application or submission to obtain Government rulings, benefits or approvals, and not to a situation merely involving, for example, the transmission or filing of a document that does not

involve an application for Government benefit, approval or ruling; a request for information; purely social or informational communications; or those required by law or regulations (in situations other than adversary proceedings). Each agency should, after consulting with the Director or the Attorney General, as appropriate, give guidance on the kinds of applications, filings and other matters which are not prohibited by section 207(c).

Example 1: A former Senior Employee of the Internal Revenue Service prepares and mails a client's tax return. This is not a prohibited act. Should any controversy arise in connection with the tax return, the former employee may not represent the client, but may be called upon to state how the return was prepared.

Example 2: A former Senior Employee of the Securities and Exchange Commission prepared and transmitted for filing to the Commission a client's annual report on form 10-K. This is not a violation, because the 10-K is a disclosure report, not intended to obtain a Government benefit or ruling.

Example 3: A former Senior Employee of the Securities and Exchange Commission becomes executive vice-president of a major industrial corporation, registered under the Securities Exchange Act of 1934. Pursuant to Commission regulations, the officers of the corporation are required to sign certain filings on behalf of the corporation, which are transmitted to the Commission. The employee may review, concur or request changes in, and sign any such filing required to be transmitted to the Commission.

(e) *Agency activity or interest in matter.* The restriction applies to the former employee's contacts with his former agency in connection with a matter before or of "direct and substantial interest" to, the agency.

Example 1: A former Senior Employee of the Securities and Exchange Commission is asked to represent Z Company in a new matter before the Commission, one in which the former employee had no prior involvement. He may not do so.

Example 2: The matter in the foregoing example is referred to the Department of Justice for prosecution, and the former employee is asked for the first time to represent Z Company in the criminal proceeding. The matter is likely to be of direct and substantial interest to the Commission. If so, the former employee may not communicate with the Commission in the matter. However, the former Senior Employee may communicate with the Commission in order to determine whether it asserts a direct and substantial interest in the criminal proceeding. In the event of a negative answer to the question, the former Senior Employee may communicate with the Commission.

Example 3: In connection with an entirely new matter a former Senior Employee of the Securities and Exchange Commission undertakes the representation of Z Company in private litigation brought by Q Company.

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(e.g., a private action arising under the Securities Exchange Act of 1934). Before the suit was commenced, there was no actual expression of interest by the Commission in the matter. As the litigation develops, an important question of statutory interpretation is raised, and the Commission files a brief as *amicus curiae* (friend of the court). The former Senior Employee may respond to the brief and need not withdraw from representation of Z Company, but he may not otherwise communicate with the Commission in the matter. If the Commission were to commence a proceeding or investigation against Z Company on the basis of the same facts involved in the private litigation, the former employee could continue his representation in the private litigation, but could not represent Z Company in the Commission's proceeding until after the expiration of one year from the termination of his employment with the Commission. [Note.—Where an agency becomes a party to a proceeding subsequent to its commencement, the question whether a former Senior Employee may continue representation should ordinarily be decided by the court on a motion for disqualification in the particular circumstances.]

Example 4: In connection with a new matter, a former Senior Employee of the Federal Food and Drug Administration, since retired to private law practice, is asked to consult and assist in the preparation of briefs to be filed with the Administration on a new particular matter. He may do so, but he should not sign briefs or other communications or take any other action that might constitute an appearance.

(f) *Application or proposals for funding of research.* In connection with any application or proposal for Government funding of research, the restrictions of this section do not prevent a former Senior Employee from assuming responsibility for the direction or conduct of such research and from providing scientific or technological information to the Senior Employee's former agency regarding such research. The former Senior Employee may not, however, submit the application on behalf of the applicant or argue for its approval or funding by the agency.

Example 1: A former Senior Employee of the National Institute of Health (NIH), employed by a university, prepares an application to NIH for a research grant. The application is submitted to NIH by the university and lists the Senior Employee as principal investigator. The Senior Employee does not violate 18 U.S.C. 207(c) by preparing the application or by being listed as principal investigator, since these are not representational activities. He may also sign an assurance to NIH, as part of the application, that he will be responsible for the scientific and technical direction and conduct of the project if an award is made. He may also communicate with NIH to provide scientific or technical information on the application, including presentation to NIH personnel at the research site, so long as he

does not argue for approval or funding of the application.

(g) *Personal matters.* Unlike the provisions of Sections 207(a) and (b) the restrictions of this section apply when the former Senior Employee seeks to represent himself. However, they do not apply to appearances or communications concerning matters of a personal and individual nature, such as personal income taxes, pension benefits, or the application of any provision of these regulations to an undertaking proposed by a Senior Employee. (See 18 U.S.C. 207(i)). A former Senior Employee may also appear *pro se* (on his own behalf) in any litigation or administrative proceeding, involving the individual's former agency. The former employee may not contact his former agency in order to secure an item of business, except for (a) discussions in contemplation of being hired by the agency as a consultant or otherwise; or (b) a proposal to furnish scientific or technological information to the Government.

Example 1: any former Government Employee may contact his or her former agency to seek information or determinations as to matters in question under these regulations or under 18 U.S.C. 207, such as whether a particular matter is considered to have been under the employee's official responsibility, whether a matter is one in which the agency asserts a direct and substantial interest, or whether a current matter is considered to be the same as that in which the employee had been involved.

(h) *Statements based on special knowledge.* The restrictions of the section do not prevent a former Senior Employee from making or providing a statement, which is based on the former Senior Employee's own special knowledge in the particular area that is the subject matter of the statement, provided that no compensation is thereby received, other than that regularly provided by law or regulation for witnesses. (See 18 U.S.C. 207(i).)

Example 1: A former Senior Employee may make any statement of his own views to his former agency on any subject matter in which he has no substantial pecuniary interest, acting on his own behalf.

Example 2: A former Senior Employee is called by his successor at the agency for the purpose of eliciting some information on a matter in which he had been involved in an official capacity. His response is not prohibited.

Example 3: A former Senior Employee may recommend an individual to her former firm for employment, based on her own personal knowledge of the individual's qualifications and character.

(i) *Measurement of one-year restriction period.* The statutory one-

year period is measured from the date when the individual's responsibility as a Senior Employee in a particular agency ends, not from the termination of Government service, unless the two occur simultaneously. (See 737.7(e).)

§ 737.13 Designation of separate statutory agencies or bureaus.

(a) *Authority.* Subsection (e) of title 18 U.S.C. 207 provides that the Director may by rule designate as "separate", a statutory agency or bureau which exercises functions which are distinct and separate from the remaining functions of the parent agency of which it is a part.

(b) *Procedure.* Each agency shall, by May 15, 1979, (and by May 15 of every year thereafter) notify the Director, in writing, of any statutory agency or bureau which should be so designated, providing:

(1) A description of the functions of the agency or bureau, indicating the basis on which such functions are claimed to be distinct and separate from the parent organization;

(2) the separate statutory basis of the agency or bureau; and

(3) identification of those positions in the parent agency with official responsibility for supervision of such separate statutory agency and bureau.

(c) *Standards.* A parent agency may propose as a "separate" statutory agency an agency or bureau (1) created specifically by statute, (2) the functions of which are expressly referred to by statute or (3) which is the successor to either of the foregoing; but a decision as to the sufficiency of the statutory authority as well as the separability of functions shall be reserved to the Director.

(d) *Effect of designation.* If a subordinate part of an agency is designated as "separate" by the Director, then Senior Employees of such separate agency and those of the parent agency are not subject to the restrictions of 207(c) as to each others' agencies—except that the prohibition of 207(c) remains applicable to the former head of a "separate" subordinate agency and to former Senior Employees of the parent agency whose official responsibility included supervision of the subordinate agency.

Example 1: A former Senior Employee of the Product Agency leaves and joins a law firm which represents Q Corporation. Product Agency has been designated by the Director as separate from Executive Department. The former employee is not restricted from representing the Q Corporation on a new matter before the Executive Department.

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737.15 Exemption for scientific and technological information.

(a) **Exemption.** The making of communications solely for the purpose of furnishing scientific or technological information pursuant to agency procedures is exempt from all restrictions and restrictions set forth in subparts 737.5-737.11 of these regulations (subsections (a), (b), and (c) of title 18 U.S.C. 207). This exemption allows the free exchange of such information regardless of a former Government employee's prior participation in or responsibility for the matter. The former Senior Employee should not argue for the acceptance of a proposal. The exemption is not limited to communications constituting the furnishing of information, but includes those "for the purpose of" doing so. No isolation occurs when, for example, a former Government employee working on a project makes contact to determine the kind and form of information required, or the adequacy of information already supplied, so long as agency procedures are satisfied.

Example 1: A project manager, regardless of prior involvement in a particular matter, may contact the Government to determine deficiencies in system design or performance, furnish scientific or technological information relating to a solution or approach to a problem, seek related information from the Government; advise and supervise others who are involved as to such matters; and meet with Government technical experts for such purpose; provided in each case that there is compliance with such agency regulations as have been issued.

(b) **Necessary information.** Scientific and technological information includes feasibility, risk, cost, and speed of implementation, when necessary to appreciate fairly the practical significance of the information. The Government may and should be fully informed of the significance of scientific and technological alternatives.

(c) **Intent to Influence.** The furnishing of meritorious or convincing scientific or technological proposals does not constitute an intent to influence. (see 737.5(b)(6) above)

(d) **Expert testimony.** This exemption does not include testimony as an "expert" in adversary proceedings in a matter in which the United States is involved or has an interest. Such testimony is governed by regulations set forth in subpart 737.19. As to assistance as an expert or consultant, see 737.9(b), Example 7.

(e) **Agency responsibility for procedures.** The primary responsibility for developing procedures to guide activity under this exemption lies with

each agency, so that such procedures comport with the particular characteristics of agency programs and needs. Such procedures will be reviewed periodically by the Director. In promulgating procedures, an agency may take into consideration: limiting communications to certain formats which are least conducive to the use of personal influence; segregating, to the extent possible, meetings and presentations involving matters of technical substance from those involving other aspects of the relationship; requiring that the designated agency ethics official be informed of instances where the exemption is used; or employing more restrictive practices in circumstances involving either immediate competition for contracts or applications for grants than in those involving an ongoing project.

§ 737.17 Exemption for Persons With Special Qualifications in a Technical Discipline.

(a) **Applicability.** A former Government employee may be exempted from the restrictions on post-employment practices if the head of the agency concerned with the particular matter, in consultation with the Director, executes a certification published in the Federal Register that such former Government employee has outstanding qualifications in a scientific, technological, or other technical discipline; is acting with respect to a particular matter which requires such qualifications; and that the national interest would be served by such former Government employee's participation.

(b) **When appropriate.** This exemption should generally be utilized only where the former Government employee's involvement is needed on so continuous and comprehensive a basis that compliance with the procedures adopted for the communication of technical information (see 737.15), or other actions to isolate the former Government employee from other aspects of the matter, would be burdensome and impractical.

(c) **Certification authority.** Certification should take place at no lower level than the head of the agency, the deputy thereof, or in the absence of both, the acting agency head. Consultation with the Director shall precede any certification. The exemption takes place upon the execution of the certification, provided that it is transmitted immediately to the Federal Register for publication.

(d) **Agency registry.** An agency may establish a registry for current

employees, wherein the nature of their qualifications in one or more technical fields is certified after review by a supervisor, as a basis for establishing such qualifications in connection with, and to expedite, a later request for certification, should the necessity for such request arise.

§ 737.19 Testimony and Statements Under Oath or Subject to Penalty of Perjury.

(a) **Statutory basis.** Section 207(h) provides:

"Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury."

(b) **Applicability.** A former Government employee may testify before any court, board, commission, or legislative body with respect to matters of fact within the personal knowledge of the former Government employee. This provision does not, however, allow a former Government employee,

otherwise barred under 18 U.S.C. 207(a), (b), or (c) to testify on behalf of another as an expert witness except: (1) to the extent that the former employee may testify from personal knowledge as to occurrences which are relevant to the issues in the proceeding, including those in which the former Government employee participated, utilizing his or her expertise, or (2) in any proceeding where it is determined that another expert in the field cannot practically be obtained; that it is impracticable for the facts or opinions on the same subject to be obtained by other means; and that the former Government employee's testimony is required in the interest of justice.

(c) **Statements under penalty of perjury.** A former Government employee may make any statement required to be made under penalty of perjury, such as those required in registration statements for securities, tax returns, or security clearances. The exception does not, however, permit a former employee to submit pleadings, applications, or other documents in a representative capacity on behalf of another merely because the attorney or other representative must sign the documents under oath or penalty of perjury.

§ 737.21 Partners of Present or Former Government Employees.

(a) **Scope.** Section 207(g) of 18 U.S.C. prohibits a partner of a current Government employee from acting as agent or attorney before the United States in a particular Government matter in which such Government employee participates, or did

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participate, personally and substantially. To the extent such section involves the activities of current Government employees and their partners, it is beyond the scope of these regulations.

(b) *Imputation.* Neither the Act nor these regulations impute the restrictions on former employees to partners or associates of such employees.

Imputation of the restrictions of sections 207(b)(ii) and (c) to partners of former employees would be inappropriate for the additional reason that section 207(b)(ii) itself restricts secondary-level activity, and section 207(c) is directed at the exercise of influence personal to the former Senior Employee.

§ 737.23 Officials of a State; Officials of Corporations Created by an Act of Congress and Public International Organizations.

For purposes of sections 207(a), (b) and (c) of title 18 U.S.C.:

(a) An official whose powers are established by the constitution of any State of the United States does not act on behalf of "any other person" or "anyone" when acting in his official capacity, but rather constitutes the official authority of the State; and

(b) A former employee does not engage in unlawful activity when he acts on behalf of (1) a corporation specifically created by an Act of Congress if any of its directors is currently appointed by the United States; or (2) any public international organization if he serves by nomination or request of the United States or on secondment from any agency.

§ 737.25 Standards and Procedures for Designating Senior Employee Positions Pursuant to 18 U.S.C. 207(d).

(a) *Definitions.* As used in these regulations "Senior Employee" refers to any person specified in or designated pursuant to 18 U.S.C. 207(d); that is, employed by the United States:

(1) At a rate of pay specified or fixed according to subchapter II of chapter 53 of title 5, U.S.C., generally known as "Executive Level";

(2) In a position in any pay system for which the basic rate of pay is equal to or greater than that for GS-17 as prescribed by 5 U.S.C. 5332, and who has significant decision-making or supervisory responsibilities, designated by the Director, pursuant to paragraph (b) below;

(3) On active duty as a commissioned officer of a uniformed service in a pay grade of O-7 or above as described in section 37 U.S.C. 201; or

(4) In such other position that has significant decision making

responsibilities or duties substantially similar to those referred to in subparagraph (2) above and is designated by the Director pursuant to paragraph (b) below.

(b) *Designation procedures.* The following procedures will be followed in designation of Senior Employee positions pursuant to 18 U.S.C. 207(d) (2) and (4):

(1) *Positions at GS-17 and 18 level and Senior Executive Service.* The following will be designated effective October 1, 1979, unless exempted as provided below: all positions classified at GS-17 or above in the General Schedule; those in any other pay system, the rate of pay for which is at least that of grade GS-17; and those in the Senior Executive Service. Each agency head shall submit to the Director, by May 15, 1979 (and on every May 15 thereafter), a report consisting of: (i) a description of all positions as set forth above; (ii) the agency's recommendation as to those positions that should not be designated, based on standards established in these regulations or any other reason; and (iii) the basis and reasons for each such recommendation. After making such additional inquiries as appear desirable, the director will determine which positions should be exempt. Initial exemptions will be made approximately July 15, 1979. Notwithstanding the foregoing, the effective date for Executive Level positions, whether or not included in the Senior Executive Service, is July 1, 1979.

(2) *Other positions.* Positions other than those noted in paragraph (1) above, may be designated as follows: Each designated agency ethics official shall submit to the Director, by June 30, 1979 (and on every June 30 thereafter), a list of such positions which involve significant decision-making authority or other duties substantially similar to those exercised by persons whose grade or position is referred to in subparagraph (b)(1), together with a statement in each case as to whether and why the position should or should not be designated. After making such additional inquiries as appear desirable, the Director may designate certain positions. Initial designations will be made before September 30, 1979, effective as of a date to be set at such time.

(3) *Standards for designation and exemption.* Positions, or classes of positions, which do not have significant decision-making or supervisory responsibility will be exempted from designation. Initial exemptions will be retroactive. Classes of positions which may be considered for exemption are

those in which decision-making responsibility does not regularly extend to major policy issues within the agency or in which supervisory responsibility extends to less than all of a directorate, bureau or department which has major policy or operational responsibility. The foregoing may include, without limitations, special assistants, technical and professional advisors to persons who make policy decisions, those involved primarily in research and technical work, and administrative law judges. No position will be designated pursuant to subparagraph (b)(2) above unless it involves significant decision-making authority, or duties which are substantially similar to those exercised by persons designated, pursuant to subparagraph (b)(1) above and not exempted.

Note.—Notwithstanding the foregoing, no designations will be made for purposes of 18 U.S.C. 207(b)(ii) until after final action on a proposed technical amendment to conform the language of such subsection to the requirement that it apply only to a matter in which the former employee participated personally and substantially.

(4) *Senior Executive Service.* The establishment of positions within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978 is the responsibility of the Office of Personnel Management. The choice of an individual to enter or not to enter the Senior Executive Service is not a relevant factor in the designation under these regulations of a position held by such person.

(5) *Rate of pay.* As used in the definition of Senior Employee, the "rate of pay" is that specified by or pursuant to law without regard to the ceiling limitations of section 5303 or 5373 of title 5 U.S.C.; except that an individual in an executive level or GS-17 or 18 position is deemed to be employed at the rate of pay specified for that position. Increases in pay due to "steps" are not considered in determining pay grade or level.

(c) *Differential designation.* Where appropriate, the Director may designate positions for purposes of 18 U.S.C. 207(c) without designating the positions for purposes of 18 U.S.C. 207(b)(ii).

Example 1: It may be determined that a given position or class of positions will be restricted as to contact in the first post-employment year, but not as to assisting in representation.

(d) *Fair notice of designation.* No designation made pursuant to 18 U.S.C. 207(d) (2) or (4) will be effective until the last day of the fifth full calendar month after the first publication of a notice by the Director of intention to designate; except as indicated in paragraph (i).

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below, and as to a person first occupying the position after such notice is published. The designation in paragraph (b)(1) above constitutes notice.

(e) *"Acting" or temporary positions.* An individual may serve in a position designated pursuant to 18 U.S.C. 207(d) for up to sixty days in an "acting" or temporary capacity without being subject to those restrictions which specially apply to such positions, unless such individual (1) was transferred or detailed from another designated position, or (2) without a significant break in continuity, is named permanently to such position.

(f) *Special Government Employee.* A Special Government Employee who serves on sixty days or less in a given calendar year may serve in a designated position without being subject to the restrictions which specially apply to such position. A Special Government Employee is deemed to serve only on those days actually engaged in work for the Government under his or her Special Government Employee arrangement.

(g) *Publication.* Positions exempted by the Director pursuant to 18 U.S.C. 207(d)(2) and designated pursuant to 18 U.S.C. 207(d)(4) will be published in the Federal Register, and from time to time may be added to Appendix A and Appendix B respectively, of these regulations.

(h) *Computation of time.* An individual who transfers from a designated position to one that is not designated shall compute the commencement of the time periods contained in 18 U.S.C. 207(b)(ii) and (c) from the time of such transfer, except as indicated in paragraph (i) below.

(i) *Position shifting.* In any case where a person transfers from a designated position to one that is not, the agency head shall within one month transmit to the Director a report reciting the functions of each position, the reason for the transfer, the identities of the prior holder of the position assumed and the successor, if any, to the position departed. If the Director designates the newly assumed position pursuant to sections 207(d)(2) or (4) of title 18 U.S.C., such designation shall be effective retroactively to the date of transfer notwithstanding paragraph (d) above.

(j) *Revocation of Designations.* In the event the Director determines that a position previously designated should not have been, the designation will be revoked. The revocation may be made retroactive if the initial designation is determined to have been erroneous or if there is a change in standards for

designation applicable to the position. Retroactive effect will not be given where the basis for revocation is a change in the functions or importance of a position.

§ 737.27 Administrative Enforcement Proceedings.

(a) *Basic procedures.* The following basic guidelines for administrative enforcement of restrictions on post-employment activities are designed to expedite consultation with the Director as required pursuant to section 207(j) of title 18 U.S.C.

(1) *Delegation.* The head of an agency may delegate his or her authority under this subpart.

(2) *Initiation of administrative disciplinary hearing.* (i) Whenever an agency has determined after appropriate review that there is reasonable cause to believe that a former Government employee has violated any of these regulations or 18 U.S.C. 207(a), (b), or (c), it may initiate an administrative disciplinary proceeding by providing the former Government employee with notice as defined in subparagraph (c). Agencies may establish procedures to protect the privacy of former employees as to allegations made prior to a determination of sufficient cause to initiate an administrative disciplinary hearing.

(ii) On receipt of information regarding a possible violation of 18 U.S.C. 207, and after determining that such information appears nonfrivolous, the agency head shall expeditiously provide such information, along with any comments or agency regulations, to the Director and to the Criminal Division, Department of Justice. The agency should coordinate any investigation on administrative action with the Department of Justice to avoid prejudicing criminal proceedings, unless the Department of Justice communicates to the agency that it does not intend to initiate criminal prosecution.

(3) *Adequate notice.* (i) An agency must provide a former Government employee with adequate notice of an intention to institute a proceeding and an opportunity for a hearing.

(ii) Notice to the former Government employee must include:

(A) A statement of allegations (and the basis thereof) sufficiently detailed to enable the former Government employee to prepare an adequate defense;

(B) Notification of the right to a hearing; and

(C) An explanation of the method by which a hearing may be requested.

(4) *Presiding official.* (i) The presiding official at proceedings under this subpart shall be the agency head or an individual to whom the agency head has delegated authority to make an initial decision (hereinafter referred to as "examiner").

(ii) Appropriate qualifications shall be established for examiners.

(iii) An examiner shall be impartial. No individual who has participated in any manner in the decision to initiate the proceedings may serve as an examiner in those proceedings.

(5) *Time, date and place.* (i) The hearing shall be conducted at a reasonable time, date, and place.

(ii) In setting a hearing date, the presiding official shall give due regard to the former Government employee's need for:

(A) Adequate time to prepare a defense properly, and

(B) An expeditious resolution of allegations that may be damaging to his or her reputation.

(6) *Hearing rights.* A hearing shall include, at a minimum, the following rights:

(i) To represent oneself or to be represented by counsel,

(ii) To introduce and examine witnesses and to submit physical evidence,

(iii) To confront and cross-examine adverse witnesses,

(iv) To present oral argument; and

(v) To a transcript or recording of proceedings, on request.

(7) *Burden of proof.* In any hearing under this subpart, the agency has the burden of proof and must establish substantial evidence of a violation.

(8) *Hearing decision.* (i) The presiding official shall make a determination exclusively on matters of record in the proceeding, and shall set forth in the decision all findings of fact and conclusions of law relevant to the matters at issue.

(ii) Within a reasonable period of the date of an initial decision, (as set by the agency) either party may appeal the decision to the agency head. The agency head shall base his or her decision on such appeal solely on the record of the proceedings or those portions thereof cited by the parties to limit the issues.

(iii) If the agency head modifies or reverses the initial decision, he or she shall specify such findings of fact and conclusions of law as are different from those of the hearing examiner.

(9) *Administrative sanctions.* The agency head may take appropriate action in the case of any individual who was found in violation of 18 U.S.C. 207(a), (b), or (c) or these regulations when

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final administrative decision or who failed to request a hearing after receiving adequate notice, by:

(i) Prohibiting the individual from making, on behalf of any other person (except the United States), any formal or informal appearance before, or, with the intent to influence, any oral or written communication to, such department or agency on any matter of business for a period not to exceed five years, which may be accomplished by directing agency employees to refuse to participate in any such appearance or to accept any such communication;

(ii) Taking other appropriate disciplinary action.

(10) *Judicial review.* Any person found to have participated in a violation of 18 U.S.C. 207 (a), (b), or (c) or these regulations may seek judicial review of the administrative determination.

(11) *Consultation and Review.* Each agency shall submit a copy of its procedures for administrative enforcement to the Director.

§ 737.29 Effective date of restrictions.

(a) *Persons affected.* Any person who holds a Government position after June 30, 1979, becomes subject to any additional restrictions relating to the holder of that position contained in the amendments to 18 U.S.C. 207 as set forth in these regulations. Restrictions which depend on the designation of a position by the Director shall become applicable on the date such designation becomes effective.

(b) *Fair notice of substantive changes.* No change in the substance of these regulations shall become effective with respect to a Government employee who is adversely affected by such change until and unless such employee remains in a position to which such change is applicable for a period of five months following the first publication of a regulation in final form, reflecting or prescribing such change, or unless such employee accepts such a position after the publication.

Appendix A [Reserved]

Note.—Appendix A reserved for Section 207(d)(2) exemptions.

Appendix B [Reserved]

Note.—Appendix B reserved for Section 207(d)(4) designations.

Appendix C [Reserved]

Note.—Appendix C reserved for Section 207(e) designations.

Beverly M. Jones,

Issuance System Manager, Office of Personnel Management.

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